91-465

Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

ACADEMY LIFE INSURANCE COMPANY, *Petitioner*,

v.

GEORGE W. GUILL, *Respondent*.

ACADEMY LIFE INSURANCE COMPANY, *Petitioner*,

v.

NORRIS O. WHITLEY, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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September 11, 1991.

QUESTIONS PRESENTED

1. Whether the Due Process Clause of the Fifth Amendment and Fourteenth Amendment to the Constitution of the United States is violated by the imposition of punitive damages where the amount of such damages is not determined with mandatory consideration by the fact finder of the character and degree of the wrong as shown by the evidence and necessity of preventing similar wrong?

2. Whether the Due Process Clause of the Fifth Amendment and Fourteenth Amendment to the Constitution of the United States is violated by the imposition of punitive damages where the amount of such damages is not made subject on post-trial and appellate review to the constraint of standards comparable to those found sufficiently definite and meaningful in *Pacific Mutual Life Ins. Co. vs. Haslip*, 499 U.S. _____, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991)?

LIST OF PARTIES AND RULE 29.1 LIST

The names of all parties to the proceedings in the court below are contained in the caption of this petition.

The petitioner, Academy Life Insurance Company, is a wholly owned subsidiary of Academy Insurance Group, Inc.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

The petitioner, Academy Life Insurance Company, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in these cases on June 19, 1991.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is unpublished. It is reprinted in the Appendix hereto, p. 1a, *infra*.

The Order of the United States District Court for the District of South Carolina, Columbia Division, (Henderson, D.J.), denying petitioner's post-trial motions is not reported. It is reprinted in the Appendix hereto, p. 9a, *infra*.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit affirming the judgments of the District Court was entered June 19, 1991, and this Petition for a Writ of Certiorari is filed within ninety (90) days thereof. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. Amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend XIV, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Respondents are former insurance agents of the petitioner whose agent, general agent and managing general agent agreements with petitioner were terminated in July, 1986. Respondents instituted separate actions in the state court of South Carolina against petitioner and others,[1] seeking recovery of actual and punitive damages. The complaints alleged, *inter alia*, causes of action for breach of the agent, general agent and managing general agent agreements by failure of petitioner to pay respondents commissions due thereunder and for conversion of sums due under the agreements. The actions were separately removed to the United States District Court for the District of South Carolina, Columbia Division, pursuant to 28 U.S.C. §1441(a) based on diversity of citizenship of the parties (28 U.S.C. §1332).

The two actions were consolidated for jury trial. At the consolidated trial, the District Court directed a verdict against petitioner in each of the cases for breach of contract, denied a motion of petitioner for directed verdict on the conversion claims, and submitted to the jury the issue of the amount of actual damages on the breach of contract causes of action and the issues of liability and damages, actual and punitive, on the conversion causes of action.

With respect to punitive damages, the District Court instructed the jury as follows:

> "The plaintiffs are also seeking punitive damages in their conversion cause of action.
>
> "The law permits the jury, under certain circumstances, to award punitive damages in order to punish a wrongdoer for some extraordinary misconduct, and

[1] The complaints as initially filed included Academy Insurance Group, Inc., Pension Insurance Group of America, Pension Life Insurance Company of America and Academy Services as party defendants. By consent order entered December 10, 1987, Pension Insurance Group of America [Pension Insurance Group of America, Inc.] was granted summary judgment in both actions. The actions were subsequently dismissed, without prejudice, as to the remaining defendants other than petitioner by stipulation filed August 19, 1988.

to serve as a warning not to engage in such conduct in the future.

"Thus, if you find that the plaintiffs have shown by a preponderance of the evidence, that the defendant converted the plaintiffs' money with malice, ill will, a conscious indifference to the rights of others, or a reckless disregard for the right of others, you may award the plaintiffs punitive damages.

"If you so find, it becomes your right to award punitive damages in such an amount as you unanimously agree to be proper in light of the character of the wrong committed, the punishment which should be applied, and the ability of the defendant to pay."

The jury returned a verdict for respondent Guill in the sum of $51,449 actual damages and $250,000 punitive damages, for a total of $301,449, and a verdict for respondent Whitley in the sum of $25,390 actual damages and $250,000 punitive damages, for a total of $275,390. Judgments were thereupon entered on the verdicts on June 8, 1989.

Petitioner timely moved for judgment notwithstanding the verdicts on the conversion causes of action and consequent punitive damages, and alternatively moved for new trial on grounds which included that the verdicts were excessive as a matter of law to the extent of the punitive damages awards; that the verdicts were excessive and appeared to have been rendered under the influence of passion, prejudice or other improper consideration; and that the verdict amounts were excessive as contrary to the weight of the evidence and unduly liberal. In the further alternative, petitioner moved for a new trial absent remittitur of a reasonable amount on the grounds of excessiveness of the verdicts, asserting that the punitive damages awards were contrary to law and that the amounts of the verdicts were contrary to the clear weight of the evidence and unduly liberal. In reply to respondents' contention that the amounts of the punitive damage awards were jus-

tified in view of the substantial discretion afforded a jury under South Carolina law with respect to punitive damages, petitioner contended that leaving the computation of punitive damages to the discretion of the jury without adequate standards for determining the amounts to be assessed as permitted under the laws of South Carolina and applied in the instant cases failed to satisfy due process and that the awards of punitive damages were in violation of the Due Process Clause of the Fifth Amendment and Fourteenth Amendment to the Constitution of the United States.

The District Court thereafter issued its consolidated Order entered July 25, 1989 (App. p. 9a, *infra*) denying petitioner's post-trial motions, concluding with respect to the punitive damages awards as follows:

> "The defendant also contends that the punitive damages award was excessive and the Court should grant a new trial on this basis. In a diversity action, state substantive law determines the circumstances justifying punitive damages and federal law governs the trial court's review of the size of the jury verdict. *Shamblin's Ready Mix, Inc. v. Eaton Corp.*, 873 F.2d 736, 738 (4th Cir. 1989) (citing *Donovan v. Penn Shipping Co.*, 429 U.S. 648, 649 (1977). Under South Carolina law, the assessment of punitive damages requires consideration of 'the character of the tort committed, the punishment which should be meted out therefor, and the ability of the defendant to pay the damages awarded.' *Albertini v. Veal*, 292 S.C. 562, 357 S.E.2d 716, 718 (Ct. App. 1987). Applying those factors here, the Court concludes the punitive damages awards are not excessive."

Petitioner thereafter appealed the judgments and denial of its post-trial motions to the United States Court of Appeals for the Fourth Circuit, contending on the appeal that the conversion verdicts were not supported by substantial evidence and also that the verdicts for punitive damages were excessive and were in violation of the Due Process Clause, having particular reference to the absence

of any clear and objective standards or guidelines which governed the jury's determination of the amount of punitive damages. During the pendency of the appeal, this Court rendered its decision in *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. _____, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991). On June 19, 1991, the United States Court of Appeals for the Fourth Circuit affirmed the judgments in both of the instant cases (App. p. 1a, *infra*). The opinion of the Court of Appeals addresses the due process issue in light of the *Haslip* case and deals with the issue as follows:

> "Academy also appeals the award of punitive damages, which was more than four times the award of compensatory damages. Academy maintains that the award is excessive and a violation of its due process rights.
>
> The Supreme Court has recently foreclosed Academy's due process claim. *Pacific Mutual Ins. Co. v. Haslip*, 111 S.Ct. 1032 (1991). The award is not so large that it is excessive as a matter of law. South Carolina courts have upheld punitive damage awards as large as ten times the actual damage award. *See Robertson v. State Farm Mut. Auto. Ins. Co.*, 464 F. Supp. 876, 879 (D.S.C. 1979) (compendium of punitive damages awards). Consequently, we will not disturb the punitive damage award in this case."

REASONS FOR GRANTING THE WRIT

I.

The opinion of the Court of Appeals misinterprets and misapplies this Court's prior decision in *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. _____ , 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991), and conflicts in principle with that decision.

The court below misinterpreted and misapplied the *Haslip* case in concluding that it foreclosed petitioner's due process claim. In *Haslip*, this Court recognized the constitutional limitation of due process upon discretionary

assessment of the amount of punitive damages, requiring for satisfaction of due process that the discretion be exercised "within reasonable constraints." (111 S.Ct. at 1044). The constraints which this Court found acceptable constrained the fact finder's discretion to "deterrence and retribution, the state policy concerns sought to be advanced" (111 S.Ct. at 1044), under instructions which had been given to the jury that if the jury were to award punitive damages, they "*must* take into consideration the character and the degree of the wrong as shown by the evidence and necessity of preventing similar wrong" (111 S.Ct. at 1044) (emphasis supplied). The constraints further included post-trial and appellate review which applied "detailed substantive standards" that had been developed by the Supreme Court of Alabama for evaluating punitive awards and which took into account:

> ". . . (a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred; (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the 'financial position' of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant of the same conduct, these also to be taken in mitigation." (111 S.Ct. at 1045)

It was the application of the foregoing enumerated standards pursuant to the Alabama protective procedure which this Court in *Haslip* concluded imposed a "sufficiently definite and meaningful" constraint on the discretion of the jury in awarding punitive damages (111 S.Ct. at 1045).

In the instant cases, the jury was not instructed in mandatory terms that if punitive damages were to be awarded, they must take into consideration the character and degree of the wrong as shown by the evidence and necessity of preventing similar wrong, as in the *Haslip* case. Further, no post-trial or appellate review consistent with the *Haslip* emphasis upon "definite and meaningful" standards was provided or exercised. The District Court recited only its consideration of the very same vague and indefinite factors that call for the constraint of definite and meaningful standards. The Court of Appeals determined the due process issue with equal indifference to any definite standards despite this Court's decision in the *Haslip* case. Moreover, it determined the matter of excessiveness of the punitive damages awards only by a comparison of the size of the verdicts with verdicts in other cases collected in *Robertson v. State Farm Mut. Auto. Ins. Co.*, 464 F.Supp. 876, 879 (D.S.C. 1979) (a case involving bad faith refusal to pay first party insurance benefits), not one of which involved a claim for conversion. [*Beaudrot v. Southern Railway Co.*, 69 S.C. 160, 48 S.E. 106 (1904) (trespass); *Bradley v. Metropolitan Life Insurance Co.*, 162 S.C. 303, 160 S.E. 721 (1931) (breach of contract accompanied by a fraudulent act); *Eaddy v. Greensboro-Fayetteville Bus Lines*, 191 S.C. 538, 5 S.E.2d 281 (1939) (breach of duty by common carrier); *Morrow v. Evans*, 223 S.C. 288, 75 S.E.2d 598 (1953) (auto collision); *Weatherford v. Home Finance Co.*, 225 S.C. 313, 82 S.E.2d 196 (1954) (fraud); *Hall v. Walters*, 226 S.C. 430, 85 S.E.2d 729 (1955) (assault); *Norton v. Ewaskio*, 241 S.C. 557, 129 S.E.2d 517 (1963) (traffic accident); *Hicks v. Herring*, 246 S.C. 429, 144 S.E.2d 151 (1965) (auto collision); *Thompson v. Home Security Life Insurance*, 271 S.C. 54, 244 S.E.2d 533 (1978) (breach of insurance contract accompanied by fraudulent act)]. Contrary to that analysis, the *Haslip* case makes it clear that inquiry as to the reasonableness of the amount of punitive damages in any given case must be made in light of their purpose of punishing "what has occurred and to prevent its repetition" (111 S.Ct. at 1045).

II.

The questions presented are important ones which warrant review by this Court.

The constant stream of litigation in recent years involving constitutional constraint on punitive damages awards is clear indication of the necessity for close adherence to this Court's guidance on the application of meaningful and definite standards in assessment of the amount of such awards. The approach of the court below in the instant cases undermines basic principles implicit in this Court's decision in *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. _____, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991), concerning issues of a recurring nature and foreshadows continuing failure of the court below to apply those principles properly unless corrected by this Court.

CONCLUSION

For the foregoing reasons, this Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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September 11, 1991.

APPENDIX

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-1509

GEORGE W. GUILL, Plaintiff - Appellee,

versus

ACADEMY LIFE INSURANCE CO., Defendant - Appellant,

ACADEMY INSURANCE GROUP, INC.; PENSION GROUP OF AMERICA; PENSION LIFE INSURANCE COMPANY OF AMERICA; ACADEMY SERVICES, Defendants.

No. 89-1510

NORRIS O. WHITLEY, Plaintiff - Appellee,

versus

ACADEMY LIFE INSURANCE CO., Defendant - Appellant,

ACADEMY INSURANCE GROUP, INC.; PENSION GROUP OF AMERICA; PENSION LIFE INSURANCE COMPANY OF AMERICA; ACADEMY SERVICES, Defendants.

Appeals from the United States District Court for the District of South Carolina, at Columbia. Karen L. Henderson, District Judge. (CA-87-2829-3-16, CA-87-2860-3-16)

Argued: February 8, 1990 Decided: June 19, 1991

Before RUSSELL and WILKINS, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Affirmed by unpublished opinion. Senior Judge Butzner wrote the opinion, in which Judge Russell and Judge Wilkins joined.

ARGUED: James Wright Crabtree, SMATHERS & THOMPSON, Charlotte, North Carolina, for Appellants. Peter L. Murphy, GLENN, IRVIN, MURPHY, GRAY & STEPP, Columbia, South Carolina; Mortimer Meyer Weinberg, Jr., WEINBERG, BROWN & MCDOUGALL, Sumter, South Carolina, for Appellees. **ON BRIEF:** Charles E. Baker, BELSER, BAKER, BARWICK, RAVENEL & BENDER, Columbia, South Carolina, for Appellants.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

BUTZNER, Senior Circuit Judge:

Academy Life Insurance Company appeals a judgment entered on a verdict for conversion of commissions it owed to George W. Guill and Norris G. Whitley. Academy claims

that the evidence does not support the verdict and that punitive damages were excessive. We held this case in abeyance awaiting the decision in *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S.Ct. 1032 (1991), for guidance on the issue of punitive damages. We now affirm.

I

Academy sells life insurance through a three-level sales force composed of agents, general agents (GAs), and managing general agents (MGAs). Academy's employment contracts provide that its agents are independent contractors. They receive sales commissions whenever they, or agents they supervise, sell a policy and thereafter whenever premiums are paid on that policy. The MGAs' right to commissions vests upon sale of the policy, and commissions are payable while the policy is in force.

Academy calculates commissions by computer as the premiums are received, and the commissions are credited to accounts assigned to each agent involved. These accounts are also used to record advances given to agents by Academy. Advances are considered loans, which agents repay with interest. In addition, MGAs have "escrow" accounts for recording a certain percentage of their commissions to serve as "collateral" for debts owed to Academy, primarily for advances, by GAs and agents operating under the MGAs. The MGAs are ultimately responsible for such debts. Academy pays interest on funds in escrow and other agent accounts, beginning 60 days after receipt of premiums.

Guill and Whitley joined Academy in the late 1970s. They began as agents and advanced to become general agents, then managing general agents. Academy fired both in July of 1986, but according to their contract Academy was obligated to pay them renewal commissions on certain existing policies which they, or agents they supervised, had sold. Following the terminations, Academy began reducing its monthly payments to the men and stopped sending the documentation which customarily accompanied those payments. Academy stopped sending the payments altogether in 1988, alleging that Guill and Whitley

had materially breached their contracts by soliciting for another life insurer.

Guill and Whitley claimed that Academy owed them commissions from premiums paid on policies which had been improperly removed from their accounts, because the agents who sold the policies were apparently reassigned to other MGAs following the termination of Guill and Whitley.

There was also evidence that escrow funds were misappropriated by Academy. Funds could be drawn from escrow accounts for only two purposes—to repay debts for which the MGA was responsible or to pay the MGA. Guill and Whitley testified that they had not received any payments from their escrow accounts, nor did they owe any money to Academy. Nonetheless, funds were withdrawn from the escrow accounts. What happened to the funds is unclear.

Guill and Whitley sued Academy in September of 1987, alleging breach of contract and conversion. In June of 1989, the district court directed a verdict against Academy for breach of contract and sent the issues of conversion and damages to the jury. The jury found against Academy on the conversion claim, returning a verdict for Guill in the amount of $51,449 actual damages and for Whitley in the amount of $25,390 actual damages. The jury awarded punitive damages of $250,000 each to Guill and Whitley.

Academy moved for judgment n.o.v. on the conversion claims and consequent punitive damages, asserting that there was insufficient evidence to support a finding of conversion. It sought a new trial to determine the damages resulting from Academy's breach of contract. Alternatively, Academy moved for a new trial because the damages were excessive, contrary to the clear weight of the law, and unduly liberal. The district court denied Academy's motions and Academy appealed.

II

The law in South Carolina on conversion was explained in *Owens v. Andrews Bank & Trust Co.*, 265 S.C. 490, 496-97, 220 S.E.2d 116, 119 (1975):

> Conversion has been defined in our case law as an unauthorized assumption and exercise of the right of

ownership over goods or personal chattels belonging to another, to the exclusion of the owners' rights. Conversion may arise by some illegal use or misuse, or by illegal detention of another's chattel.

Money may be the subject of conversion, when it is capable of being identified, and there may be conversion of determinate sums even though the specific coin and bills are not identified. However, there can be no conversion where there is a mere obligation to pay a debt. (citations omitted).

Academy claims that the commissions owed to Guill and Whitley were debts which were to be paid out of Academy's general funds and its retention of the commissions was, therefore, not conversion. Academy relies upon *Owens v. Zippy Mart of S.C.*, 268 S.C. 383, 234 S.E.2d 217 (1977). In *Zippy Mart* the South Carolina Supreme Court held that an employer's withholding of an employee's wages because the employer believed that the employee had stolen money did not constitute conversion.

The South Carolina Supreme Court has distinguished mere failure to pay a debt, as in *Zippy*, from affirmative misconduct in the failure to pay a debt, as in *Andrews*. In *Andrews* the bank failed to return a customer's deposit when she closed the account. Instead, the bank retained her money as security against a debt that her husband owed the bank. The South Carolina Supreme Court held that this constituted conversion.

In *Zippy Mart* the Supreme Court noted that *Andrews* "was predicated on conduct more onerous than a simple breach of contract. . . . While emphasizing the depositor's immediate right to possession and the want of any legal right to detain delivery of funds, *Owens* was couched primarily on the character and motive of the conduct involved." 268 S.C. at 385, 234 S.E.2d at 218. Zippy Mart's mere failure to pay disputed wages was not "oppressive conduct . . . sufficient to constitute a tort of conversion." 268 S.C. at 386, 234 S.E.2d at 218.

Taken together, *Zippy Mart* and *Andrews* show that in South Carolina, onerous conduct in refusing to pay money

that indisputably belonged to the plaintiff will transform a breach of contract to pay a debt into conversion. For example, in *McTeer v. Provident Life & Accident Ins. Co.*, 712 F. Supp. 512, 518 (D.S.C. 1989), the district court held that a disputed claim to an interest payment was not conversion, because there was no "onerous conduct of the sort that would convert [the parties'] relationship into something more than that of debtor-creditor."

In this case, Academy's conduct satisfies the onerous conduct requirement of conversion. Academy took affirmative steps to hide the premiums it owed to the plaintiffs. There was also ample evidence that Academy misused the commissions. Guill and Whitley both testified that Academy failed to pay them the commissions they earned, suggesting that Academy reassigned the commissions to other agents. Further, both men testified to the unauthorized use of funds in their escrow accounts and to Academy's failure to provide information about the activity in their accounts.

In a related point, Academy argued that the plaintiffs failed to identify specific money to show conversion.

Academy is correct that the plaintiffs must be able to identify the money that has been converted. But "there may be conversion of determinate sums even though specific coin and bills are not identified." *Andrews*, 265 S.C. at 496-97, 220 S.E.2d at 119. Guill and Whitley identified specific amounts of money that the jury could find belonged to them. Guill and Whitley were independent contractors who sold Academy's insurance in exchange for a specific percentage of the premiums. Although the premiums were collected by Academy, they were allocated upon receipt between Academy and the agents involved. Some of the funds were withheld in "escrow" accounts to offset advances or other debts owed by agents to Academy. In addition, Academy paid interest on these funds, further indicating that the funds were the agents' property.

There is no error in the court's charge to the jury. The charge thoroughly set out the law in South Carolina on conversion and distinguished conversion from breach of contract. The court's instructions on conversion, which are

set out in the margin,* were taken directly from South Carolina case law. The instructions emphasized that to find conversion the jury had to find that the money was identifiable and that Academy had misused the money to the detriment of Guill and Whitley in what amounted to "onerous conduct." Because there is sufficient evidence to support the verdict, we affirm the district court's denial of Academy's motion for judgment n.o.v. on the conversion claim.

III

Academy also appeals the award of punitive damages, which was more than four times the award of compensatory damages. Academy maintains that the award is excessive and a violation of its due process rights.

The Supreme Court has recently foreclosed Academy's due process claim. *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S.Ct. 1032 (1991). The award is not so large that it is excessive as a matter of law. South Carolina courts have upheld punitive damage awards as large as ten times the actual damage award. *See Robertson v. State Farm Mut. Auto. Ins. Co.*, 464 F. Supp. 876, 879 (D.S.C. 1979) (compendium of punitive damages awards). Consequently, we will not disturb the punitive damage award in this case.

AFFIRMED

*Money may be the subject of conversion, but an action for conversion will not lie to enforce a mere obligation to pay money. *Dawkins v. National Liberty Life Ins. Co.*, 263 F. Supp. 119 (D.S.C. 1967). For money to be the subject of conversion it must be capable of being identified, and there can be conversion of determinate sums even though the specific coin and bills are not identified. *Owens v. Andrews Bank & Trust Co.*, 265 S.C. 490, 220 S.E.2d 116 (1975).

A person may not recover damages for conversion if the defendant is merely exercising a legal right or if the claim is for the payment of a mere debt. *Owens v. Zippy Mart of South Carolina, Inc.*, 268 S.C. 383, 234 S.E.2d 217 (1977). Thus, the plaintiffs may not recover from the defendant on their conversion claims if you find that there is merely the relationship of debtor and creditor between the plaintiffs and the defendant or if you find that the plaintiffs' claims are for mere breach of contract. *Id.* The plaintiffs must establish more onerous conduct by the defendant, such as use of the money for its own wrongful purpose to the plaintiffs' detriment. *Owens v. Andrews Bank & Trust Co.*, 265 S.C. 490, 498, 220 S.E.2d 116 (1975). (Citations were omitted when read to the jury).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

GEORGE W. GUILL, Plaintiff

versus

ACADEMY LIFE INSURANCE COMPANY, Defendant

Civil Action No. 3:87-2829-16

NORRIS O. WHITLEY, Plaintiff

versus

ACADEMY LIFE INSURANCE COMPANY, Defendant

Civil Action No. 3:87-2860-16

ORDER

Entered 7/25/89

This matter is before the Court on the defendant's motions for judgment notwithstanding the verdict, for a new trial or for remittitur. On a motion for judgment n.o.v., the Court must consider the record as a whole and in the light most favorable to the party opposing the motion and, if there is substantial evidence opposed to the motion, that is, evidence of such quality and weight that reasonable and fair minded men in the exercise of impartial judgment could reasonably return a verdict for the nonmoving party, the motion should be denied. *Wyatt v. Interstate & Ocean Transp. Co.*, 623 F.2d 888, 891 (4th Cir.

1980). Alternatively, on a motion for new trial the Court should set aside a verdict and grant a new trial, even though it is supported by substantial evidence, if the verdict was reached under improper instructions or if the Court is of the opinion that the verdict is against the clear weight of the evidence or is based upon evidence which is false or will result in a miscarriage of justice. *Wyatt*, 623 F.2d at 891-92. Because the Court concludes the jury was properly instructed and because it finds the verdict supported by substantial evidence and not against the clear weight of the evidence, the defendant's motion is denied.

At the trial the plaintiffs claimed that the defendant breached its contract with them, former insurance salesmen affiliated with the defendant. The plaintiffs claimed that, after their contractual relationship with the defendant terminated, the defendant breached their contracts by not paying them their commissions on life insurance policies they had sold while their contracts with the defendant were in force. In addition to the breach of contract claim, the plaintiffs alleged that the defendant converted the commissions owed them by reassigning the commissions to other agents. The Court directed a verdict on the breach of contract claim in favor of the plaintiffs and the jury awarded each plaintiff the amount of commissions each claimed to be owing plus ten percent interest and punitive damages of $250,000.

The defendant first argues that the Court should grant its motion for judgment n.o.v. by striking the punitive damages awards and should order a new trial as to the issue of actual damages on each plaintiff's breach of contract claim. The defendant argues the punitive damages are improper because there was insufficient evidence adduced at trial to support a conversion claim. The evidence was insufficient, according to the defendant, because it showed only that the money at issue was a debt owed to the plaintiffs and that it was not sufficiently determinate and specific to be the subject of a conversion.

None of the parties disputes the Court's substantive charge on the law of conversion in South Carolina or the Court's explanation to the jury as to the findings it had to

make in order to hold the defendant liable for conversion.[1] The charge correctly informed the jury of the following principles:

> Money may be the subject of conversion, but an action for conversion will not lie to enforce a mere obligation to pay money. *Dawkins v. National Liberty life Ins. Co.*, 263 F. Supp. 119 (D.S.C. 1967). For money to be the subject of conversion it must be capable of being identified, and there can be conversion of determinate sums even though the specific coin and bills are not identified. *Owens v. Andrews Bank & Trust Co.*, 265 S.C. 490, 220 S.E.2d 116 (1975).
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> A person may not recover damages for conversion if the defendant is merely exercising a legal right or if the claim is for the payment of a mere debt. *Owens v. Zippy Mart of South Carolina, Inc.*, 268 S.C. 383, 234 S.E.2d 217 (1977). Thus, the plaintiffs may not recover from the defendant on their conversion claims if you find that there is merely the relationship of debtor and creditor between the plaintiffs and the defendant or if you find that the plaintiffs' claims are for mere breach of contract. *Id.* The plaintiffs must establish more onerous conduct by the defendant, such as use of the money for its own wrongful purpose to the plaintiffs' detriment. *Owens v. Andrews Bank & Trust Co.*, 265 S.C. 490, 498, 220 S.E.2d (1975).[2]

The Court concludes there was substantial evidence from which the jury could determine that the funds at

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[1] The only part of the charge with which the defendant now disagrees is the following statement: "[T]he plaintiffs allege that by withholding money owed them under their contract, and by applying that money to other uses, the defendant converted the money owed them." The Court rejects the challenge to this statement, first, because the defendant did not raise a timely objection to it before or immediately after the charge was delivered. Fed. R. Civ. P. 51. As to the merits of the defendant's objection, the Court concludes the statement in the context of the charge as a whole did not prejudice the defendant.

[2] The written jury charge was as quoted here; nevertheless, the jury charge as delivered did not include the citations.

issue were sufficiently determinate to be subject to the defendant's conversion. The evidence was undisputed that the plaintiffs were independent contractors, not employees. *Cf. Owens v. Zippy Mart of South Carolina, Inc.*, 268 S.C. 383, 234 S.E.2d 217 (1977). Moreover, sufficient evidence was presented that, although the defendant collected premiums on the plaintiffs' behalf, the percentages of premiums designated in the contracts as due the plaintiffs belonged to and were the property of the plaintiffs as the premiums were collected. The only defense witness testified that the defendant's computer system "allocated" the premiums collected between the plaintiffs' portion and the defendant's portion. In addition, funds withheld from the plaintiffs as an off-set for advances and other debts owing to the defendant were designated as "escrow" funds, again raising the inference that these funds were both determinate and the property of the plaintiffs. Based on this evidence, and for the reasons given at trial for declining to direct a verdict for the defendant on the conversion claim, the defendant's motion for judgment n.o.v. on this ground is denied. In addition, the Court does not find the jury's verdict on this claim to be against the clear weight of the evidence and denies the defendant's motion for a new trial. The Court also finds that the jury acted in accordance with the charge in adding ten percent interest to the amount of actual damages awarded for conversion. The award of interest is therefore properly included in the judgment.

The defendant further argues that the Court should not have charged conversion to the jury. To the extent the defendant objects to the substance of the charge on conversion, the objection is barred because the only objection raised at trial was that the issue of conversion should not go to the jury at all. Fed. R. Civ. P. 51; *T. C. Allen Construction Co. v. Stratford Corp.*, 384 F.2d 653 (4th Cir. 1967). For the reasons already discussed, the Court finds that sufficient evidence existed in the record to warrant a charge on conversion.

The defendant next complains that the Court erred in allowing the plaintiffs' counsel to cross-examine the

defense witness with regard to difficulties the defendant had experienced with a life insurance product known as E-95. As the Court ruled at trial, the Court concludes that the testimony was properly admitted because of its relevance to the plaintiffs' conversion claim.

As an alternative ground for a new trial, the defendant argues the verdict should be set aside as being excessive and against the clear weight of the evidence. Under Fed. R. Civ. P. 59, a district court has the discretion to grant a new trial if, based on the Court's own view of the evidence and the credibility of the witnesses, the Court concludes the size of the verdict is either excessive or against the clear weight of the evidence. *Virginian Ry. Co. v. Armentrout*, 166 F.2d 400 (4th Cir. 1948); *Wyatt*, 623 F.2d at 891-92; *see also Occidental Life Insurance Co. of North Carolina v. Pat Ryan & Associates*, 496 F.2d 1255, 1264 (4th Cir.), *cert. denied*, 419 U.S. 1023 (1974); *Great Coastal Express, Inc. v. International Brotherhood of Teamsters*, 511 F.2d 839, 845-48 (4th Cir. 1975).

Here, the court does not deem the verdict for actual and punitive damages to be excessive. The actual damages award represents the amount the plaintiffs claim they are due. The plaintiffs testified as to how they computed their figures in some detail and the defendant had ample opportunity to cross-examine the plaintiffs on this issue. The defendant also presented its version of how the amounts owed should be calculated. The defense obviously failed to convince the jury that its method was more accurate than that used by the plaintiffs. The Court concludes that substantial evidence supported the jury's determination that the plaintiffs' version of the money due was correct. In addition, the Court finds that the verdict for actual damages is not against the clear weight of the evidence and was not rendered under the influence of passion, prejudice or other improper considerations. The Court therefore denies the defendant's motions for judgment n.o.v., for a new trial and for a remittitur based on the size of the actual damages award.

The defendant also contends that the punitive damages award was excessive and the Court should grant a new

trial on this basis. In a diversity action, state substantive law determines the circumstances justifying punitive damages and federal law governs the trial court's review of the size of the jury verdict. *Shamblin's Ready Mix, Inc. v. Eaton Corp.*, 873 F.2d 736, 738 (4th Cir. 1989) (citing *Donovan v. Penn Shipping Co.*, 429 U.S. 648, 649 (1977). Under south Carolina law, the assessment of punitive damages requires consideration of "the character of the tort committed, the punishment which should be meted out therefor, and the ability of the defendant to pay the damages awarded." *Albertini v. Veal*, 292 S.C. 561, 357 S.E.2d 716, 718 (Ct. App. 1987). Applying these factors here, the Court concludes the punitive damages awards are not excessive.

For the foregoing reasons, the Court denies the defendant's motions for judgment n.o.v., or in the alternative, for a new trial and for remittitur.

IT IS SO ORDERED.

/s/
KAREN LeCRAFT HENDERSON
UNITED STATES DISTRICT JUDGE

Columbia, South Carolina
July 24, 1989